IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 69
5369837

	BETWEEN	DIRTWORKS LIMITED AS TRUSTEE OF DIRTWORKS TRUST Applicant
	AND	DANIEL ROSS BLOMFIELD First Respondent
	AND	STEPHEN KIRK MARSHALL Second Respondent
Member of Authority:	Robin Arthur	
Representatives:	Bradley Syred for the Applicant Allan Silberstein for the Respondents	
Investigation Meeting:	20 February 2012	
Determination:	24 February 2012	

DETERMINATION OF THE AUTHORITY

A. **Until 2 July 2012, or further order of the Authority or the Employment Court before then, Daniel Blomfield and Stephen Marshall are enjoined from personally or on behalf of any other entity or employer soliciting or carrying out work or services involving accepting or importing cleanfill for any existing or previous client of the Dirtworks Trust (as listed in the document CCC attached to the affidavit of Iydden Wood sworn 2 February 2012), where the cleanfill is either accepted from and/or tipped at sites within the restricted area (shown in the map in document I attached to the affidavit of Mr Wood sworn 17 February 2012).**

B. **This interim injunction is issued in reliance on an undertaking as to damages given by the Dirtworks Trust and on the other conditions set out in this determination.**

Employment relationship problem

[1] In a statement of problem lodged in the Authority on 3 February 2012 Dirtworks Limited, as trustee of the Dirtworks Trust (Dirtworks), sought an interim injunction and a number of other orders against former employees of the Trust, Dan Blomfield and Steve Marshall. The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit in support of the application from Dirtworks director Iydden Wood.

[2] This determination concerns, in the main, the application for interim injunction. The substantive matter – regarding alleged breaches of terms of employment and claims for penalties, damages and costs – is to be investigated by the Authority at dates yet to be notified but likely to be in April 2012.

[3] Dirtworks is in business as an earthmoving contractor. This includes collection of soil – referred to as cleanfill – from building sites (contractor clients) and depositing on other sites that require cleanfill (landowner clients). Dirtworks says its primary source of income is tip fees paid by the contractor clients. Those clients are other earthmoving contractors who pay to dispose of cleanfill on the tip sites organised by Dirtworks with its landowner clients.

[4] Mr Blomfield worked as a machine operator and salesman for Dirtworks from April 2011 to 15 December 2011. On 29 November 2011 he was given notice that his employment was to end in three weeks due to redundancy.

[5] Mr Marshall was a machine operator and foreman from June 2011 to 15 December 2011. His employment ended by resignation on 1 December 2011 from when, according to Dirtworks, a two week notice period applied.

[6] On 15 December 2011 Mr Marshall and Mr Blomfield registered a company named Blomfield Contracting Limited (Co. no. 3683396) (BCL). They are directors and equal shareholders of BCL. Its registered office is at Mr Marshall's residential address.

[7] Dirtworks alleged Mr Blomfield, before his employment ended and since then,

has obtained work from clients of Dirtworks that he and Mr Marshall carried out for the benefit of themselves personally or BCL rather than Dirtworks. The work is said to have been done in breach of terms of their employment agreements regarding obligations as employees, use of confidential information and non-solicitation of clients. Dirtworks alleged those activities by Mr Blomfield and Mr Marshall had already resulted in a loss of revenue of $109,000, with that amount calculated as the difference between expected and actual revenue for the period for December 2011 through to 22 January 2012.

[8] Orders sought by Dirtworks against Mr Blomfield and Mr Marshall included:

(i) an interim injunction preventing them soliciting or carrying out work involving accepting or using cleanfill for existing or previous clients of Dirtworks;

(ii) a compliance order requiring them to stop soliciting work from Dirtworks clients or using leads obtained by them before ending their employment with Dirtworks and to return or destroy Dirtworks emails, client lists and contact details still in their possession; and

(iii) penalties for breaches of their employment agreements before leaving work and since; and

(iv) an award of damages for losses said to have been suffered by Dirtworks due to breaches of their employment agreements; and

(v) an order allowing Dirtworks to offset the losses and penalties claimed by deducting the final pay due to them ($2223 for Mr Blomfield and $1971 for Mr Marshall, both sums net after tax and legally required deductions).

The investigation on the interim injunction application

[9] The Authority granted Dirtworks' application for this matter to be dealt with on an urgent basis. That was agreed to as the usual procedure for dealing with an application for an interim injunction and because of the level of losses Dirtworks said it was incurring due to the alleged breaches by Mr Blomfield and Mr Marshall.

[10] At a case management conference by telephone on 8 February 2012 the Authority heard from the representatives and made directions for the parties to attend mediation and, if the matter was not settled, to lodge further documents. Mr Marshall

and Mr Blomfield were directed to lodge affidavits – which they did (along with 10 supporting affidavits) – and their statement in reply – which they did three days later than the appointed time. Dirtworks was also given an opportunity to lodge a further affidavit from Mr Wood in response to the affidavits of Mr Marshall and Mr Blomfield – which it did.

[11] Although lodged late the statement of reply from Mr Blomfield and Mr Marshall was admitted, without an application for leave being required,[1] only because parts of its contents were relevant to the interim proceedings and because Dirtworks did not object to the late lodgement.

[12] At the investigation meeting on 20 February 2012 I heard submissions from the representatives regarding the interim injunction application and tested those submissions with a number of questions to the representatives about how the available evidence related to the relevant principles for determining an interim injunction application. Those principles are addressed in the answers to the following questions:

(i) is there an arguable case that Dirtworks will succeed at the Authority's substantive investigation in establishing that Mr Blomfield and Mr Marshall have breached and are continuing to breach the terms of employment agreements binding on them and that the non-solicitation clause in those agreements is reasonable and enforceable against them; and

(ii) if so, is there an adequate alternative remedy available to Dirtworks – specifically an award of damages that Mr Blomfield and Mr Marshall could pay – such that interim injunction is not necessary at the moment; and

(iii) if not, where does the balance of convenience lie between the parties; and

(iv) finally, does the overall justice of the case require an interim injunction be granted now or not?

[13] In answering those questions the Authority relied on the submissions of the representatives and the as-yet-untested evidence available in the affidavits lodged by the parties. Conclusions drawn are consequently tentative and not necessarily what will be decided at the substantive investigation after full examination of all the evidence that will then be available. At the present stage the Authority assumes

[1] Employment Relations Authority Regulations 2000 r8(3).

assertions made in the affidavits will be able to be established at the substantive investigation, although some commonsense assessment may be made regarding disputed points (including by use of relevant documents also lodged with the various affidavits).

[14] As well as the affidavits of Mr Wood, Mr Blomfield and Mr Marshall, affidavits from the following people were before the Authority:

(i) Rob Ryan, director of RNB Transport Limited, who has been a client of Dirtworks and now uses BCL; and

(ii) Kerry Blake, director of Blake Civil Construction Limited, who said he was "not a specified client of Dirtworks" and used any tip available; and

(iii) Regan Wu, landowner, 240 Paremoremo Road who said he wanted Mr Wood to remove from his affidavit an "alleged statement and comment" from Mr Wu – that statement was about Mr Wu seeing Mr Marshall and Mr Blomfield working on neighbouring properties in November and Mr Blomfield visiting Mr Wu's property in early September; and

(iv) Stephen Oxborough, a former employee of Dirtworks and now director of Teraforma Limited, who was critical of Mr Wood's work practices and treatment of him; and

(v) Peter Cappe, a former employee of Dirtworks, who was critical of Mr Wood's work practices and treatment of him; and

(vi) Paul Lim, landowner, 639 Kahikatea Flat Road, Kaukapakapa, who had been a customer of Dirtworks but was dissatisfied and had since asked Mr Blomfield to finish work on the property; and

(vii) Mario Anderson, truck driver for Contract Landscapes Limited, who attested to Mr Blomfield's integrity; and

(viii) Alan Yu, an independent contractor, who said he had stopped using Dirtworks because he was "very unhappy with their workmanship".

(ix) Joe Pomare, a truck driver, who attested to Mr Blomfield's honesty in his dealings with him as a client; and

(x) Tami Gibbs, who had worked as an operator for Dirtworks, said she attended a meeting on 15 July 2011 where she heard Mr Marshall tell Mr Blomfield that he was dissatisfied with the terms of the employment agreement provided by Dirtworks, particularly the two year restraint clause and the rate of pay.

[15] The Authority has the power under s162 of the Employment Relations Act 2000 (the Act) to grant an interim injunction regarding a restraint of trade or a non-solicitation clause, being an order of the kind that the High Court or the District Court may make under particular enactments and rules of law.[2]

Is there an arguable case?

Binding terms of employment

[16] Mr Blomfield and Mr Marshall maintained they had not agreed to a two-year long non-solicitation clause as a term of their employment and, having objected to such a term, were not bound by it. It was a proposition that, on the affidavit evidence, I did not accept was tenable and Mr Silberstein cited no satisfactory statutory or case law authority for it. Rather I find Dirtworks has an arguable case that the two men entered employment with it on the now-disputed terms – evidenced in Mr Blomfield's case by the signed copy of his agreement and in Mr Marshall's case by his conduct. That conduct comprised working for and being paid by Dirtworks for that work in the knowledge that it had offered him employment on terms that included the non-solicitation clause.

[17] Mr Blomfield denied he had signed an employment agreement containing the clauses on non-solicitation, confidential information and conflict of interest on which Dirtworks relied. He suggested the copy of an agreement apparently signed by him on a cover sheet and initialled on a second page was the result of Dirtworks having swapped the cover sheet from a bonus pay agreement that he did sign. While his theory would have to be examined in the substantive investigation, I accept Dirtworks has an arguable case based on copies of email correspondence with Mr Blomfield during 2011. That correspondence referred to terms or clauses in the agreement that Mr Blomfield now maintains he had not signed but included no suggestion from him at the time that he was not bound by such an agreement and its terms.

[18] There was a dispute in the affidavit evidence as to whether Mr Marshall had communicated his objections to a two year non-solicitation clause. He and Mr Gibbs

[2] *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205

deposed that Mr Woods had heard Mr Marshall voice that opposition while Mr Woods deposed he knew nothing of it. However even accepting Mr Marshall's affidavit evidence on that point, Dirtworks' case remains arguable for two reasons. Firstly, it is not clear whether he stated an objection to a non-solicitation clause *per se* or only one that ran for so long. Secondly, it is clear that he was given a written employment agreement (at least twice) in which the term was stated and he knew from the outset that this was the basis on which he was employed. He did not sign an agreement and handed an unsigned one to Mr Blomfield but continued to work for Dirtworks. On 4 October 2011 Dirtworks took the precaution of writing to Mr Marshall asking him to sign and return the agreement. Its letter noted that although he had not yet provided a signed copy, he had not said or done anything to indicate he did not agree with it and "*therefore [his] silence and continued attendance at work is sufficient an indication of acceptance of the employment agreement*".

[19] The relevant terms, applicable to both men, include the following:

> *4.2 Obligations of the Employee*
> *The Employee shall:*
> …
> *(iii) conduct their duties in the best interests of the Employer and the employment relationship;*
> …
> *10.1 Confidential information*
> *The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, intellectual property, data, information about the Employer's business, or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, material developed by the Employee as an employee of the Employer.*
>
> *10.2 Conflicts of Interest*
> *The Employee agrees that there are no contracts, restrictions or other matters which would interfere with their ability to discharge their obligations under this agreement. If, while performing their duties and responsibilities under this agreement, the Employee becomes aware of any potential or actual conflict between their interests and those of the Employer, then the Employee shall immediately inform the Employer. … When acting in their capacity as Employee, the Employee shall not, either directly or indirectly, receive or accept for their benefit or the benefit of any other person or entity other than the Employer any gratuity, emolument, or payment of any kind from any person having or intending to have any business with the Employer.*

> *10.4 Severability*
> *In the event any portion of this clause is viewed as unenforceable by any Authority or Court with jurisdiction to consider such clauses, the clause shall apply as modified by the Authority or the Court, or in the event it is not modified by the Authority or the Court, the remainder of this clause and agreement shall continue to be enforceable by the parties.*
>
> *10.5 Non-solicitation of clients*
> *The Employee agrees that for a period of two years following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work or services of a similar nature to those provided by the Employer, for any existing or previous client or customer of the Employer.*
>
> *12.4 Obligations of Employee on termination*
> *Upon the termination of this agreement for whatever reason, or at any other time if so requested by the Employer, the Employer shall immediately return to the Employer all information, material or property … either belonging to or the responsibility of the Employer and all copies of that material, which are in the Employee's possession or under their control.*

Were terms breached with resulting losses to Dirtworks?

[20] The affidavits of Mr Woods establish an arguable case that:

(i) before his employment with Dirtworks ended Mr Blomfield had breached terms regarding conflict of interest and misuse of confidential information by arranging cleanfill tipping from contractor clients who understood the arrangement was with Dirtworks but who were charged by or paid fees to Mr Blomfield, either in his personal capacity or trading as Blomfield Contracting. (The evidence in support of this allegation includes copies of emails, invoices, answer phone messages and telephone records for calls made to and from the mobile phone provided to Mr Blomfield by Dirtworks.)

(ii) since his employment with Dirtworks ended Mr Blomfield had breached terms regarding non-solicitation of clients and misuse of confidential information. (There is specific evidence regarding tip sites at Paremoremo Road, Hobson Road and Dairy Flat Highway.)

(iii) since his employment with Dirtworks ended Mr Marshall had breached the terms of the non-solicitation clause by carrying out work for previous or existing clients of Dirtworks. (There is

specific evidence regarding sites in Hobson and Paremoremo Roads).

[21] The affidavits of Mr Marshall and Mr Blomfield deny any wrongdoing but do not address Mr Wood's specific evidence of alleged breaches. In respect of one alleged instance – tipping at 248 Paremoremo Road since 2 December 2011 – Mr Marshall's response was that his employment had ended by then and the non-solicitation clause was not binding on him.

[22] In the statement in reply Mr Blomfield:

> *"admits he solicited business from previous clients or existing clients of [Dirtworks] who did not solely support [Dirtworks] for a short period prior to the termination of his employment on the 12th December 2011 and subsequent to the termination of such employment".*

[23] However:

> *"he desisted from any further attempts to solicit such customers' business as soon as he became aware that they solely supported [Dirtworks] to the exclusion of any other cleanfill operators".*

[24] The affidavits of Mr Ryan and Mr Blake also confirm Mr Blomfield has dealt with them as previous or existing clients of Dirtworks. However Mr Blomfield, through the statement of reply, also asserted he had obtained Mr Wood's consent to conducting his own business while still employed by Dirtworks and subsequently. He said Mr Wood had told him: "*If you are so good, do it yourself*". He also alleged that when he told Mr Wood he intended getting some work in for himself, Mr Wood had said: "*That is fine. You can finish up earlier if you want to*".

[25] That evidence will be subject to full examination in the Authority's substantive investigation but meanwhile, I find, Dirtworks has established an arguable case that acts that may amount to breaches of the terms of employment by both men have occurred. Dirtworks has also established, I find, an arguable case that the actions of Mr Blomfield particularly resulted in losses of revenue from business that would otherwise have come to Dirtworks. This is particularly so because of Mr Blomfield's apparent misconception about whether he can now approach clients he

previously dealt with on behalf of Dirtworks and deal with them if they agree that they are not "*solely*" clients of Dirtworks.

Was the restraint reasonable and enforceable?

[26] Mr Marshall and Mr Blomfield will not have breached the terms of the non-solicitation clause if it is found to have been a term that was not reasonable and therefore unenforceable.

[27] The law on such terms, generally, has been summarised in this way:[3]

> *Such a covenant is prima facie unlawful, but will be upheld to the extend that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises that he has in what may be called his trade secrets and his trade connections: and provided further that the covenant is not unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.*

[28] I find Dirtworks has established an arguable case that during their employment Mr Blomfield, and to a lesser extent Mr Marshall, had access to trade secrets and trade connections in which Dirtworks had a legitimate proprietary interest for which protection was reasonably necessary.

[29] Dirtworks' trade secrets comprised, broadly, its business plan and model of operating in a 'niche' market of matching contract clients wanting to tip cleanfill with relatively small-scale tipping sites on the properties of landowner clients (rather than larger, long-term tipping sites that required resource consent). To carry out that business Dirtworks had developed, at its own cost, a body of current information about what was permitted in certain zones under district plans and by-laws in the North and West Auckland areas in which it operates. Its business was based on applying that knowledge to the needs of its existing or prospective clients. While any person could, over time, develop a similar body of knowledge from publicly available council documents and business dealings with such clients, Dirtworks' knowledge was the result of its investment in the time and salary costs of its managers and staff, including in recent months, Mr Marshall and Mr Blomfield. Both had access to that

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[3] *The Broadcasting Corporation of New Zealand v Nielsen* (1988) 2 NZELC 96,040.

information along with Dirtworks' database of existing and previous clients, contact information and information about previous business conducted with them. That information was vital for Mr Blomfield in his sales role for Dirtworks.

[30] Dirtworks' trade connections included not only that business history with those previous and existing clients but also what Mr Blomfield did in following up leads and arranging new or further work during his employment by Dirtworks. The benefit of those connections was a proprietary interest of Dirtworks because Mr Blomfield was paid a salary (with bonuses) for that work. To the extent that, through their paid work with those clients, Mr Marshall and Mr Blomfield developed goodwill for Dirtworks by doing their job well or thoroughly, the benefit of that goodwill was also a proprietary interest Dirtworks had bought and paid for.

[31] Dirtworks has an arguable case that such proprietary interests are protected by its non-solicitation clause but the terms of that clause are enforceable only to the extent that is reasonably necessary to protect those interests.

[32] As drafted the clause is too wide – it has no geographic limit and its purported length of two years is arguably too long. Its length needs to be considered in light of both the length of service of both men (Mr Blomfield, 8 months; Mr Marshall, 5 months) and what is necessary to protect the actual trade secrets and customer connections Dirtworks has.

[33] Dirtworks argues there is a specific industry factor which supports a two year restraint – under the particular council rules for the areas of West and North Auckland in which it operates, the landowner clients may only allow up to 200 cubic metres of cleanfill to be tipped on their property once every 12 months. On that basis it argues that existing or previous landowner clients may only repeat their business after at least a year so that the business cycle and the opportunity for further custom is at least two years long.

[34] I doubt Dirtworks has an arguable case for that full period as it is really seeking protection for as long as necessary to *guarantee* securing further business. However, in my analysis, the case law supports protection of customer connections for only as long as reasonably necessary to give the former employer an *opportunity*

to prepare to meet the competition of its former employee, but not so long as to make doing so a certainty. Mr Blomfield was made redundant from his sales role so the reasonably necessary period in the present case is not the length of time needed to recruit, train and introduce his replacement to customers.[4] Mr Wood was said to be continuing to carry out that sales and client liaison role (for which Mr Blomfield had been recruited to assist). The period necessary for Mr Wood to contact and deal with those clients in order to shore up Dirtworks' customer connections I would consider, on an arguable case basis, to reasonably be no longer than six months.

[35] In earlier discussions with Mr Blomfield and Mr Marshall, and in its application to the Authority, Dirtworks had not sought to enforce the non-solicitation clause in the very wide sense it was written. It accepted two limitations:

(i) not applying the restraint to all work or services "*of a similar nature to those provided by the Employer*" (which included activities such as digger work and tree felling) but instead only to such work or services "*involving accepting or importing cleanfill*"; and

(ii) identifying a specific area of North and West Auckland to which the restraint applied.

[36] The geographic limit to certain rural and semi-rural areas of North and West Auckland was defined on a map attached to one of Mr Wood's affidavits – an area slightly wider than from Orewa in the north to Taupaki in the south.

[37] It also accepted that the limitation on contact or work for previous or existing clients was only to the extent that accepting cleanfill from contractor clients or importing cleanfill for land owner clients (that is tipping it on their property) occurred within that defined area. Put another way, Mr Blomfield or Mr Marshall were, in Dirtworks argument, not prevented from arranging business with those clients outside that area. Neither would they be prevented from working for or arranging business with clients within that area who were not previous or existing customers of Dirtworks.

[38] Overall I agree Dirtworks has an arguable case for the reasonableness and

[4] *Tullet Prebon (Australia) Pty Ltd v Simon Purcell* [2008] NSWSC 852 at [53]

enforceability of the non-solicitation (and non-work) clause on the geographic limits identified, but only – at this interim stage – for the period of six months.

Is there an alternative remedy available?

[39] There was no evidence that Mr Blomfield and Mr Marshall would be able to meet any award of damages Dirtworks might gain when its claim was fully investigated and determined. They provided no information on their assets, savings or income, either personally or through the business of BCL, that might have suggested such an award would be an adequate alternative to an interim injunction. Rather the second affidavit of Mr Wood provided information that Mr Blomfield had a number of debts or financial obligations that might make it difficult for him to meet a damages award. Those obligations included an attachment order for $12,798 of unpaid fines (issued on 27 September 2011), a child support deduction notice, and a Disputes Tribunal order for the payment of $4353 to an insurance company (issued on 1 December 2011).

[40] I conclude an award of damages would not be an adequate alternative remedy to the issuing of an interim injunction.

Where does the balance of convenience lie?

[41] The balance of convenience considers the relative hardship resulting to each party from whether or not an interim injunction was imposed on Mr Blomfield and Mr Marshall. It lies, I find, with Dirtworks.

[42] Dirtworks suffered an estimated revenue loss of around $110,000 for the months of December 2011 and January 2012. This calculation was based on averages for the previous four months of revenue. In light of the evidence of Mr Blomfield having contacted a number of potential clients for BCL using information and trade connections he gained or developed while employed by Dirtworks, and having gained the work which he and Mr Marshall are carrying out, that loss of revenue is likely to continue. If an interim injunction were not granted, Dirtworks would likely continue to suffer those losses with the prospect that even if there were later an award of damages, Mr Blomfield and Mr Marshall may not be able to pay some or all of any

amount awarded.

[43] Mr Marshall and Mr Blomfield have reasonable prospects for employment or business which does not rely on continuing to take custom from Dirtworks during the period of an interim injunction. They are both experienced earthmoving contractors and, without breaching the non-solicitation clause, could work on house excavations, roading, farm work, drainage, footings, demolition work, floor slabs, trucking, civil works, landscaping, tree works, firewood, subdivisions, concreting, driveways, pool excavations, retaining walls, drilling, car park and hard stands. They could also use their knowledge and skills regarding cleanfill work by working for clients in other areas, such as South Auckland, or for clients in the identified North and West Auckland area who have not previously been Dirtworks customers.

[44] I have also considered the effect on third parties – particularly, in this case, contractors and landowners wanting cleanfill services. Some examples of such parties were deponents who provided supporting affidavits to Mr Blomfield and Mr Marshall and said they wanted to deal with them (or BCL) rather than Dirtworks. The evidence suggests that the market for such services is competitive and there are a number of alternatives for such customers, including using larger commercial tip sites during the term of an interim injunction. Mr Blake, for example, said he used "*any tip available*". Consequently I am satisfied that while the ability of such customers to do business with Mr Blomfield and Mr Marshall during the period of the injunction will be restricted, those customers will not be impeded from carrying out their own business because other providers of cleanfill services are available to them (which may or may not include Dirtworks).

What is the overall justice?

[45] Standing back from the detail and considering the case on a global basis, I consider the overall justice supports an interim injunction on those activities of Mr Blomfield and Mr Marshall (either personally or through their company BCL) that appear to breach their surviving obligations to their former employer.

[46] The interim injunction is subject to limits accepted by Dirtworks which I consider keeps the restriction to the minimum necessary to protect its legitimate

property interests while providing sufficient opportunity for Mr Marshall and Mr Blomfield to use their knowledge and skills to earn a living in the meantime and until the Authority can determine the substantive claims against them. That view is reached on a balancing of the respective pubic interest considerations regarding Dirtworks' property rights and parties' adherence to contractual terms against the freedoms of Mr Blomfield and Mr Marshall to work and earn a living.[5]

Orders

[47] Accordingly the following orders are made on the conditions also set out here:

(i) in reliance on the undertaking as to damages lodged by Dirtworks, Daniel Blomfield and Stephen Marshall are enjoined from personally or on behalf of any other entity or employer soliciting or carrying out work or services involving accepting or importing cleanfill for any existing or previous client of the Dirtworks Trust (as listed in the document CCC attached to the affidavit of Iydden Wood sworn 2 February 2012), where the cleanfill is either accepted and/or tipped at sites within the restricted area (shown in the map in document I attached to the affidavit of Mr Wood sworn 17 February 2012); and

(ii) the term of this order is from the date of this determination until 2 July 2012 (unless varied before that date by further order of the Authority or the Employment Court); and

(iii) on the following conditions:

(a) within seven days of the date of this determination, Dirtworks is to lodge with the Authority $4194, being the net sum calculated as due to Mr Blomfield and Mr Marshall in final pay, with that sum to be held in an interest bearing account by the Department of Labour on the Authority's behalf until further order of the Authority; and

(b) Mr Blomfield and Mr Marshall are not restricted from working for a primary contractor on the terms set out in a letter from Dirtworks to Mr Blomfield dated 29 November 2011 (Document H to Mr Woods' 2 February 2012 affidavit); and

[5] *Fuel Espresso Limited v Hsieh* [2007] ERNZ 60 at [21] (CA).

(c) The client list is to be read as referring to all those clients or customers (whether people or companies) that Mr Blomfield and Mr Marshall would reasonably be expected to know were customers or clients of Dirtworks even if the name as listed in Document CCC is spelt incorrectly or is incomplete.

Explanatory points

[48] While the evidence of alleged breaches is mostly about Mr Blomfield's activities, the interim injunction applies in equal measure to Mr Marshall because the evidence establishes that he is now working in business with Mr Blomfield.

[49] The interim injunction applies to activities of Mr Blomfield and Mr Marshall whether carried out in a personal capacity or on behalf of BCL or another entity. That is because the non-solicitation clause refers to activity as an "*agent for any other entity or employer*".

[50] If approached by a potential customer who asks them to do work in breach of the terms of the interim injunction or their employment agreements, Mr Blomfield and Mr Marshall will need to explain that they are legally bound for the moment not to accept or do such work. Such a potential customer should also be aware of a risk of legal action against them for a penalty under the Act if Mr Blomfield and Mr Marshall did such work. Section 134 allows for a penalty for "*every person who incites, instigates, aids or abets any breach of an employment agreement*". The present penalties are up to $10,000 for a person and $20,000 for a company.

[51] The orders for the interim injunction have not referred to a Dirtworks contact list said to be still held by Mr Blomfield. The full contents of that list were not available in the evidence and I was not satisfied that it was sufficiently precise or defined to be capable of enforcement by the Authority in the event of an alleged further breach if it were included in the scope of the interim injunction. The list is said by Mr Blomfield to be mixed with personal contacts on his phone or electronic records. The information, including leads he generated while employed by Dirtworks, however remains the property of Dirtworks. Use of that material by Mr Blomfield or Mr Marshall for their personal or business gain may ultimately be found to be a

breach of their obligations regarding confidential information once the Authority has conducted its substantive investigation.

[52] At the conclusion of the investigation meeting I urged Mr Blomfield and Mr Marshall to seek expert legal advice about what they could and could not do if an interim injunction was issued.

[53] The conditions of the order include a requirement for Dirtworks to 'pay in' wages it admitted were still owed to Mr Blomfield and Mr Marshall. Dirtworks is not entitled to exercise the self help remedy of 'offsetting' wages in advance of an award of damages.

Next steps

[54] The Authority will shortly convene a case management conference to set timetable directions for the investigation of Dirtworks' substantive claims.

Costs

[55] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Robin Arthur
Member of the Employment Relations Authority